

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**STATE OF MISSOURI,  
RESPONDENT**

**vs.**

**CHRISTOPHER PICKERING,  
APPELLANT**

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DOCKET NUMBER WD77930

DATE: NOVEMBER 10, 2015

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Appeal from:

The Circuit Court of Daviess County, Missouri  
The Honorable Daren L. Adkins, Judge

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Appellate Judges:

Before Division One: Cynthia L. Martin, P.J., Joseph M. Ellis, J. and James E. Welsh, J.

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Attorneys:

Andrea B. Gibson, for Respondent

Jeffrey S. Eastman, for Appellant

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**STATE OF MISSOURI, RESPONDENT**

**v.**

**CHRISTOPHER PICKERING, APPELLANT**

WD77930

Daviess County, Missouri

Before Division Three Judges: Joseph M. Ellis, P.J., Gary D. Witt, J. and Zel M. Fischer, Sp.J.

Christopher Pickering appeals from his conviction in the Circuit Court of Daviess County of one count of the class B misdemeanor driving while intoxicated, § 577.010. Appellant was sentenced to a term of ten days in the county jail.

**REVERSED AND REMANDED.**

**Division Three holds:**

- (1) The trial court erred in admitting into evidence the results of a DataMaster breath test of Appellant's blood alcohol level. The State failed to establish a sufficient foundation for the admission of the test results because no evidence was admitted establishing that the breath alcohol simulator used for verification and calibration of the DataMaster device had been certified against a National Institute of Standards and Technology traceable reference thermometer or thermocouple between January 1, 2013, and December 31, 2013, as required by 19 C.S.R. 25-30.051(4).
- (2) Statements made by the trial court following closing argument clearly reflect that the trial judge considered and relied upon the breath alcohol test results in rendering its verdict. Accordingly, prejudice was sufficiently established to warrant reversal of Appellant's conviction and sentence.
- (3) The record contains sufficient evidence, if found credible, for a trier of fact to find that Appellant was driving while intoxicated even without the breath alcohol test. The arresting officer testified that he observed Appellant driving his car in an erratic and dangerous manner, demonstrating an inability to remain in his lane of traffic and suddenly exiting the highway without signaling. He noted that Appellant's breath smelled moderately of alcohol, his eyes were bloodshot and glassy, and his speech was thick and slurred. Appellant admitted having consumed alcohol. When he was given the horizontal gaze nystagmus test, Appellant demonstrated six out of six clues of intoxication. Appellant then proceeded to fail the one-leg-stand test and the

walk-and-turn test. Trooper Gilliland testified that the field sobriety test results indicated to him that Appellant was probably intoxicated. While the trial court could certainly reach the contrary conclusion, the foregoing evidence would clearly be sufficient to support Appellant's conviction.

- (4) Because the record contains sufficient evidence, if found credible, for a trier of fact to find that Appellant was driving while intoxicated even without the breath alcohol test, the case must be remanded for a new trial or other proceedings consistent with this opinion.

Opinion by Joseph M. Ellis, Judge

Date: November 10, 2015

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